IN THE
SUPREME COURT OF MISSOURI

No. 91880

FANNIE MAE,
Plaintiff-Respondent,

v.

MY TRUONG,
Defendant-Appellant.

Appeal from the Associate Circuit Court
of Jefferson County, Missouri,
Hon. Ray Dickhaner, Associate Circuit Judge

BRIEF FOR RESPONDENT

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STATEMENT OF FACTS

This is an unlawful detainer action commenced on September 22, 2010, by the Federal National Mortgage Association ("Fannie Mae" or "Respondent") against My Quang Truong ("Appellant") in the Associate Circuit Court for Jefferson County, Missouri (L.F. 6). Fannie Mae pleaded that it was the legal owner and entitled to possession of real estate at 5016 Warren Road in Imperial, Missouri, pursuant to a Trustee's Deed resulting from Fannie Mae's purchase of the property at a foreclosure sale held on September 10, 2010 (L.F. 21).

Appellant was the previous owner of the property and the obligor on a mortgage loan secured by a deed of trust dated March 22, 2006 (L.F. 36-46). Appellant received multiple notices of the foreclosure sale (L.F. 25, 28, 108, 109, 110) but took no steps to dispute the claimed default and did not try to enjoin or otherwise avoid the foreclosure sale. When he refused to surrender the premises following the foreclosure sale, counsel for the purchaser, Fannie Mae, gave him notice to vacate (L.F. 33), which was ignored. The unlawful detainer action was then commenced.

On November 24, 2010, Fannie Mae filed a motion for summary judgment (L.F. 48). On December 7, appellant filed his answer and counterclaims to the petition (L.F. 54). He sought to raise eleven affirmative defenses, including the claim that sections of Chapter 534 RSMo., which prohibit affirmative defenses and counterclaims in unlawful detainer actions, "are unconstitutional because they violate both the Missouri Constitution and the United States Constitution by, among other things, denying Defendant due process, equal protection under the

law, the right to be heard, the free and equal access to courts and the efficient and fair resolution of claims and by imposing penalties and undue burdens on litigants" (L.F. 55-56).

Appellant's counterclaims pleaded negligence and unjust enrichment (L.F. 59-60). In Count III, he sought a declaratory judgment determining that the foreclosure was void and invalid and that his constitutional rights were violated by precluding his assertion of affirmative defenses and counterclaims (L.F. 60-61). He did not name the State or any state official as a party to the counterclaim and did not serve or otherwise supply a copy to the Attorney General.

Fannie Mae moved to strike the affirmative defenses and counterclaims as unauthorized in unlawful detainer actions (L.F. 66). Appellant attempted extensive discovery and moved for a continuance (L.F. 65-110). He opposed the motion for summary judgment, again challenging the constitutionality of the unlawful detainer statutes (L.F. 111).

The associate circuit court heard argument on the pending motions on January 18, 2011 (Tr. 1-10). During that hearing, the court advised appellant's counsel that any appeal of its judgment would necessarily be to the circuit court on trial de novo, not to the Court of Appeals (Tr. 9). The court then entered an order staying the unlawful detainer case for 30 days "to allow Defendant to file an action to contest the matters which are raised in the Reply and Answer" (L.F. 138). The case was continued until February 22 (L.F. 138).

On February 22, the parties reconvened for further argument that was not recorded or transcribed. At that time, appellant filed another answer and counterclaim containing the same assertions and claims with some embellishments

(L.F. 163-69). On February 28, the associate circuit court entered an order granting summary judgment to Fannie Mae (L.F. 187). The court noted that appellant had rejected its offer to stay the unlawful detainer proceedings upon appellant's proper assertion of his claims in circuit court. It pointed out that appellant had not refuted the fact of the foreclosure sale or Fannie Mae's possession of the Trustee's Deed. Thus, Fannie Mae was held entitled to possession of the property. The court also assessed $6000 in double damages for five months of unlawful holding over by appellant, pursuant to § 534.330. All other pending motions were ruled consistent with the summary judgment. Id.

Appellant did not request trial de novo in the circuit court. Instead, on April 5, 2011, he noticed an appeal to this Court based on his constitutional arguments (L.F. 214).[1/]

[1/] The circuit clerk apparently sent the appeal to the Missouri Court of Appeals, Eastern District, by mistake (L.F. 217). That court transferred the case here.

POINTS RELIED ON

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE APPELLANT FAILED TO APPLY FOR TRIAL DE NOVO IN THE CIRCUIT COURT, WITHIN TEN DAYS OF THE JUDGMENT OF THE ASSOCIATE CIRCUIT COURT, AS REQUIRED BY §§ 512.180 AND 512.190 RSMO, AND THIS COURT DOES NOT HAVE JURISDICTION TO HEAR A DIRECT APPEAL FROM THE ASSOCIATE CIRCUIT COURT IN AN UNLAWFUL DETAINER CASE.

Cammarata v. State Farm Mut. Auto Ins. Cos., 953 S.W.2d 160 (Mo. App. E.D. 1997);

V.F.W. Post 7222 v. Summersville Saddle Club, 788 S.W.2d 796 (Mo. App. S.D. 1990);

Christman v. Richardson, 818 S.W.2d 307 (Mo. App. E.D. 1991);

Commerce Bank, N.A. v. Hayes, 276 S.W.3d 352 (Mo. App. E.D. 2009).

II. THIS APPEAL SHOULD BE DISMISSED BECAUSE APPELLANT FAILED TO SERVE HIS COUNTERCLAIM OR HIS BRIEF ON THE ATTORNEY GENERAL, AS REQUIRED BY § 527.110 RSMO AND SUPREME COURT RULE 87.04.

Land Clearance Redev. Auth. v. City of St. Louis, 270 S.W.2d 58 (Mo. banc 1954);

Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503 (Mo. banc 1991);

Uniform Declaratory Judgments Act § 11;

Section 527.110 RSMo and Mo. Sup. Ct. Rule 87.04.

III. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE PROVISIONS OF CHAPTER 534 RSMO DO NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.

Lindsey v. Normet, 405 U.S. 56 (1972);

Leve v. Delph, 710 S.W.2d 389 (Mo. App. E.D. 1986);

Doe v. Phillips. 194 S.W.3d 833 (Mo. banc 2006);

Jamison v. Dep't of Soc. Servs., 218 S.W.3d 399 (Mo. banc 2007).

IV. THIS COURT DOES NOT HAVE JURISDICTION OF THE ISSUES RAISED IN APPELLANT'S POINT IV, WHICH, IN ANY EVENT, WERE PROPERLY DECIDED BY THE ASSOCIATE CIRCUIT COURT.

Section 512.180 RSMo;

Walker v. Anderson, 182 S.W.3d 266 (Mo. App. W.D. 2006);

Central Bank of Kansas City v. Mika, 36 S.W.3d 772 (Mo. App. W.D. 2001);

Phelps v. Phelps, 299 S.W.3d 77 (Mo. App. S.D. 2009).

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE APPELLANT FAILED TO APPLY FOR TRIAL DE NOVO IN THE CIRCUIT COURT, WITHIN TEN DAYS OF THE JUDGMENT OF THE ASSOCIATE CIRCUIT COURT, AS REQUIRED BY §§ 512.180 AND 512.190 RSMO, AND THIS COURT DOES NOT HAVE JURISDICTION TO HEAR A DIRECT APPEAL FROM THE ASSOCIATE CIRCUIT COURT IN AN UNLAWFUL DETAINER CASE.

The right of appeal is purely statutory, and where a statute does not give a right to appeal, no right exists. Farinella v. Croft, 922 S.W.2d 755 (Mo. banc 1996). In unlawful detainer actions, the appeal right is authorized by Art. V, § 27 of the Missouri Constitution and codified in § 512.180 and 512.190 RSMo (2010 Supp.). The former statute, in relevant part, provides:

> "1. Any person aggrieved by a judgment in a civil case tried without a jury before an associate circuit judge, other than an associate circuit judge sitting in the probate division or who has been assigned to hear the case on the record under procedures applicable before circuit judges, shall have the right of trial de novo in all cases tried before municipal court or under the provisions of chapters 482, 534, and 535."[2/]

Unlawful detainer actions are controlled by the provisions of Chapter 534, and appeals are therefore subject to § 512.180.1. Pursuant to § 512.190, trial de novo

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[2/] This case was not assigned to the associate circuit court by the circuit court but was originally filed directly in the associate circuit court (L.F. 6).

in the circuit court "shall be perfected by filing an application for trial de novo with the clerk serving the associate circuit judge within ten days after the judgment is rendered."

In this case, appellant did not apply for trial de novo within ten days but instead filed a Notice of Appeal to this Court 35 days after the associate circuit court judgment (L.F. 214). He therefore did not comply with the only statutory mechanism available to him for post-judgment relief, and his purported appeal to this Court should be dismissed.

Parties may appeal directly to an appellate court from an associate circuit court only in those cases which do not fall within the scope of § 512.180.1, which authorizes applications for trial de novo in the circuit court. Cammarata v. State Farm Mut. Auto. Ins. Cos., 953 S.W.2d 160, 161 (Mo.App.E.D. 1997), citing Farinella, 922 S.W.2d at 756; Christman v. Richardson, 818 S.W.2d 307, 308 (Mo.App.E.D. 1991); Plaza Point Invs., Inc. v. Dunnaway, 637 S.W.2d 303, 305-06 (Mo.App.W.D. 1982). Both before and after the changes from justice of the peace courts to magistrate courts to associate circuit courts, and the amendment of § 512.180 in 1997, it has been held that any litigant dissatisfied with an unlawful detainer judgment is required to proceed to the circuit court rather than directly to the Court of Appeals or this Court. As noted in Crossroads West Shopping Ctr. v. American Oil Co., 658 S.W.2d 445, 447 (Mo.App.W.D. 1983),

> "Under the old justice court system, it was well established that the justice courts had exclusive original jurisdiction of unlawful detainer suits, Ashenhurst v. Johnson, 167 S.W.2d 397, 399[2] (Mo.App. 1942), and that

the circuit courts had only appellate jurisdiction over such cases. Downing v. LaShot, 202 Mo.App. 509, 212 S.W. 30, 32[1] (Mo.App. 1919)."

The Crossroads court further observed that the same scheme was still in effect "since associate circuit judges now stand in the place of justices of the peace . . ." Id.

V.F.W. Post 7222 v. Summersville Saddle Club, 788 S.W.2d 796 (Mo.App.S.D. 1990), is almost exactly on point. The unlawful detainer defendant, like appellant here, sought to file a counterclaim that was rejected. It then noticed an appeal directly to the Court of Appeals, which dismissed the appeal with the following comments:

> ". . . Saddle Club claims that the only appeal available from the unlawful detainer action was by application for trial de novo. That claim is well founded. Unlawful detainer actions arise under Chapter 534 and are regularly heard and determined by the associate circuit judge of the county in which the action arises. . . . The practice and procedure prescribed by Chapter 517 applies. § 534.060. Statutes and Supreme Court rules which apply to practice and procedure before a circuit judge . . . do not apply to the cases or classes of cases to which Chapter 517 is applicable." Id. at 799 (footnotes and citations omitted).

The Eastern District disagreed with V.F.W. and reached the opposite conclusion in Kohnen v. Hameed, 894 S.W.2d 196, 199-200 (Mo.App.E.D.

1995).[3/] But more recently a different division of that same court, citing Farinella, followed the V.F.W. line of reasoning and held that a tenant's sole means of review of an unlawful detainer judgment was by way of trial de novo in the circuit court. Commerce Bank, N.A. v. Hayes, 276 S.W.3d 352, 354 (Mo.App.E.D. 2009). We submit that V.F.W. and the other cases reaching the same conclusion are better reasoned and more faithful to the statutory scheme than the outlier Kohnen, which was earlier rejected by its own author and has never been followed in an unlawful detainer context.

Appellant's "discussion" of jurisdiction is cursory and flawed. Merely labeling his challenge as "constitutional" does not entitle him to skip the lower-court exhaustion requirements and come directly to this Court. See Greenbriar Hills Country Club v. Director of Revenue, 2 S.W.3d 798 (Mo. banc 1999). Appellant further contends (Br. 6-7) that he can bypass the circuit court under subsection 2 of § 512.180, which allows "all other contested civil cases tried with or without a jury before an associate circuit judge" in which a "record" is kept to be appealed "upon that record to the appropriate appellate court." That provision does not apply here for various reasons.

First – and most tellingly – subsection 1 of § 512.180 specifically provides for trial de novo "in all cases tried . . . under the provisions of chapter . . . 534."

[3/] Inexplicably, the Kohnen opinion was written by the same judge who, just four years earlier in Christman, 818 S.W.2d at 308, had held: "Only where the case does not fit [within subsection 1 of § 512.180] may a party appeal directly to the appellate court."

Subsection 2 applies in "all other" cases – thus excluding unlawful detainer actions filed under Chapter 534. This explains the holding in Cammarata, 953 S.W.2d at 161, that direct appeals lie only in those cases that are not subject to trial de novo under subsection 1.

Second, the obvious purpose of subsection 2 is to obviate a retrial before the circuit court when the associate circuit court has already conducted a trial and has made a transcript of the proceedings which can be effectively reviewed by the Court of Appeals. Here, there was no trial and, thus, no trial record.

Third, there was not even a "record" made of the ultimately dispositive proceedings in the associate circuit court – the final argument on respondent's motion for summary judgment. The 10-page transcript supplied to this Court pertains to an earlier hearing in January 2010 that was continued to February 22, 2010. The February argument on the summary judgment motion was conducted without a court reporter or any other means of recordation, and no transcript exists. Notably, in the January proceedings, the associate circuit judge offered to stay the unlawful detainer case to allow appellant to assert his claims in circuit court (L.F. 138), an offer appellant refused. And the court also expressly advised appellant's counsel that "you don't have any appeal to the Court of Appeals. You've got a de novo right." (Tr. 1/18/10 at 9).

Fourth, the books are full of unlawful detainer cases decided by the Court of Appeals after trial de novo in the circuit court. See, e.g., JP Morgan Chase Bank v. Tate, 279 S.W.3d 236, 237 (Mo.App.E.D. 2009); P.M. Constr. Servs., Inc. v. Lewis, 26 S.W.3d 284, 286 (Mo.App.W.D. 2000); Maniaci v. Hutchings, 581 S.W.2d 912, 913 (Mo.App.E.D. 1979).

Fifth, no court has ever adopted appellant's interpretation of § 512.180, as indicated by the conspicuous absence of any supporting authority in his brief.

Accordingly, this Court is without jurisdiction of appellant's purported appeal, and the appeal should be dismissed.[4/]

II. THIS APPEAL SHOULD BE DISMISSED BECAUSE APPELLANT FAILED TO SERVE HIS COUNTERCLAIM OR HIS BRIEF ON THE ATTORNEY GENERAL, AS REQUIRED BY § 527.110 RSMO AND SUPREME COURT RULE 87.04.

In attempting to thwart the unlawful detainer proceedings in the associate circuit court, appellant filed a "Counterclaim" asserting that the unlawful detainer statutes, §§ 534.010, et seq., are unconstitutional and seeking, in Count III, a declaratory judgment that respondent was thereby precluded from ousting him from the property in question (L.F. 55-56, 60-61). At no time did appellant ever notify the state Attorney General of his attempt to invalidate these Missouri statutes, nor was the Attorney General served with appellant's brief in this Court. His appeal should therefore be dismissed for lack of jurisdiction for this additional reason.

Both § 527.110 "Parties" and Rule 87.04 "Joinder of Parties – Municipalities – Attorney General" require that "if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a

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[4/] This appeal cannot be transferred to the circuit court for trial de novo because appellant's notice of appeal was filed 25 days after the deadline for seeking a trial de novo. See Commerce Bank v. Hayes, 276 S.W.3d at 354.

copy of the proceeding and be entitled to be heard." This Court has held that this requirement is "mandatory." Land Clearance Redev. Auth. v. City of St. Louis, 270 S.W.2d 58, 63 (Mo. banc 1954); Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 507 (Mo. banc 1991); Bauer v. Bd. of Elec. Comm'rs, 198 S.W.3d 161, 164 n.6 (Mo.App. E.D. 2006) (dicta); Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights, 737 S.W.2d 250, 254 (Mo.App.S.D. 1987) (dicta). The LCRA Court noted that § 527.110 is a verbatim iteration of § 11 of the Uniform Declaratory Judgments Act and that the "weight of authority" under identical statutes in other states had refused to consider constitutional claims asserted in the absence of the Attorney General. 270 S.W.2d at 63.

That "weight" has added substantial heft during the last half century. In each of the following cases, the court applied the exact same requirement to dismiss the case where the state attorney general was not properly notified of an attempt to have a statute declared unconstitutional:

Medina Twp. Trustees v. Armstrong Utilities, Inc., 457 N.E.2d 933 (Ohio App. 1983) (no jurisdiction).

Sendak v. Debro, 343 N.E.2d 779 (Ind. 1976) (no jurisdiction).

Bollhoffer v. Wolke, 223 N.W.2d 902 (Wis. 1974) (dismissal of appeal).

Lazo v. Bd. of Cnty Comm'rs, 690 P.2d 1029 (N.M. 1984) (no relief available).

Lakewood Pawnbrokers, Inc. v. City of Lakewood, 512 P.2d 1241 (Colo. 1973) (declaration of invalidity vacated).

Roehl v. Pub. Utility Dist. No. 1, 261 P.2d 92 (Wash. 1953) (no jurisdiction).

Plantation Pipe Line Co. v. City of Bremen, 170 S.E.2d 398 (Ga. 1969) (no jurisdiction).

Cummings v. Shipp, 3 S.W.2d 1062 (Tenn. 1928) (no jurisdiction).

City of Gadsden v. Cartee, 184 So.2d 360 (Ala. 1966) (no jurisdiction).

Thus, apart from the other deficiencies plaguing appellant's case, his claims are a non-starter from the outset because of his failure to comply with § 527.110 and Rule 87.04.

III. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE PROVISIONS OF CHAPTER 534 RSMO DO NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.

If, despite the arguments in Points I and II, the Court should determine that it has jurisdiction in this case, appellant's constitutional arguments should be rejected. None of the aspects of Chapter 534 about which he complains violate due process or equal protection under either the state or federal constitution.

Appellant's constitutional arguments are plagued by his failure to recognize (or to admit) three undeniable considerations: (1) The unlawful detainer statutes are an exclusive and special code that provide for summary relief and are therefore not subject to the rules of practice and procedure that apply to other civil actions. Phelps v. Phelps, 299 S.W.3d 707, 709 (Mo.App.S.D. 2009); Broken Heart Venture, L.P. v. A & F Restaurant Corp., 859 S.W.2d 282, 286 (Mo.App.E.D.

1993); Leve v. Delph, 710 S.W.2d 389, 391-92 (Mo.App.E.D. 1986); Lake in the Woods Apartment v. Carson, 651 S.W.2d 556, 558 (Mo.App.E.D. 1983).[5/]

(2) The sole issue in unlawful detainer is the immediate right to possession, and equitable defenses and counterclaims are not permitted because they would defeat the purpose of such an action, which is to promptly restore possession of the premises to the party rightfully entitled thereto. Leve, 710 S.W.2d at 391-92; Lake in the Woods, 651 S.W.2d at 558; Central Bank of Kansas City v. Mika, 36 S.W.3d 772, 774 (Mo.App.W.D. 2001).

(3) Appellant's repeated mantra that he has been deprived of his right to contest respondent's right to foreclose or to assert other claims against respondent is simply wrong. His rights remain intact, but he must assert them in a separate proceeding. Broken Heart, 859 S.W.2d at 286; Meier v. Thorpe, 822 S.W.2d 556, 558-59 (Mo.App.S.D. 1992). As stated in Lake in the Woods, 651 S.W.2d at 558: "Tenant-defendants still have the right to litigate their claim . . . using the appropriate statute in the proper forum. . . . Defendants thus were not without remedy."

In the present case, appellant could have – and should have – sought to enjoin the foreclosure in a proceeding in which all of his present contentions could have been aired and resolved or should have accepted the court's offer to stay proceedings while his claims were adjudicated in a proper forum. The Court

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[5/] This well-recognized principle requires rejection of the argument made in appellant's Point V (Br. 56-59), based on an alleged inconsistency between Chapter 534 and the Supreme Court rules.

should take judicial notice, however, that appellant has since filed a suit for wrongful foreclosure in Jefferson County Circuit Court asserting ten causes of action against CitiMortgage, Fannie Mae, and the Trustee. My Truong v. CitiMortgage, Inc. et al., Jefferson County Circuit Court No. 11E-CC00468.

A. Equal Protection (Appellant's Point I)

Appellant's principal argument on equal protection contends that unlawful detainer litigants are treated differently from other litigants and that there is no rational basis for such differentiation (Br. 21-32). Under a rational basis analysis, a party attacking a classification has the burden to establish that it does not rest on any reasonable basis but is purely arbitrary. Doe v. Phillips, 194 S.W.3d 833, 845-46 (Mo. banc 2006); Eastern Mo. Laborers' Dist. Council v. St. Louis, 5 S.W.3d 600, 604 (Mo.App.E.D. 1999). If any set of facts can be conceived to justify a classification, it will be sustained. Id.

While appellant assails the mortgage lending business and melodramatically protests the supposed victimization of hypothetical borrowers (Br. 26, 30), he cites no authority even remotely on point. Perhaps that is because this issue was definitively laid to rest 40 years ago by the United States Supreme Court and has never been decided otherwise in any case we have discovered.

In Lindsey v. Normet, 405 U.S. 56 (1972), the Court addressed the constitutionality of the Oregon Forcible Entry and Wrongful Detainer statute containing features very similar to those in Chapter 534. There, as here, proceedings for possession of property were expedited and summary in nature; the triable issues were limited to the tenant's default; and defenses based on the landlord's conduct were precluded. The Supreme Court ruled that the Oregon

statutory scheme did not run afoul of either the Due Process Clause of the Fourteenth Amendment or the Equal Protection Clause (except with regard to a bonding requirement for appeal which is irrelevant to this case).

In response to the equal protection argument that unlawful detainer defendants were invidiously discriminated against vis-à-vis defendants in other cases (i.e., the same contention advanced here by appellant), the Court ruled that the statute applied to all tenants and that "[t]here are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants." Id. at 72. Classifying tenants of real property differently for purposes of possessory actions will offend equal protection "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." Id. at 70; accord Riche v. Director of Revenue, 987 S.W.2d 331, 337 (Mo. banc 1999).

The Lindsey court held that the need for rapid restoration of the landlord's possession without undue expense was a reasonable legislative goal. 405 U.S. at 70. Moreover, the Court noted that at common law self-help was recognized as a legitimate method of regaining one's property, and frequently such actions were "fraught with 'violence and quarrels and bloodshed.'" Id. at 71; accord Redman v. Perkins, 98 S.W. 1097, 1098 (Mo. App. 1906). Thus, the challenged statutes averted resort to self-help and violence, and "[t]he statute, intended to protect tenants as well as landlords, provided a speedy, judicially supervised proceeding to settle the possessory issue in a peaceful manner." 405 U.S. at 72-73. Accordingly, "Oregon was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes." Id. at 73.

Missouri's equal protection clause, Art. I, § 2, is co-extensive with the same provision of the United States Constitution. In re Care & Treatment of Coffman, 225 S.W.3d 439 (Mo. banc 2007). Hence, the Lindsey Court's equal protection analysis was followed by this Court in Dixon v. Davis, 521 S.W.2d 442, 444 (Mo. 1975), and in Rice v. Lucas, 560 S.W.2d 850, 855 (Mo. banc 1978). In Rice, the Court held that a provision of § 535.040 that denied a jury trial to a defendant in landlord-tenant case was not unconstitutional because such cases at common law were not triable to juries in justice-of-the-peace courts.

The Lindsey reasoning is sound and is consistent with this Court's equal protection jurisprudence. It applies with full force to Chapter 534, and appellant's equal protection argument is therefore groundless.

B. Due Process (Appellant's Points II and III)

Lindsey also mandates rejection of appellant's due process theories. The core of appellant's due process argument is that he is being deprived of his right to assert claims against respondent. But the Supreme Court held that there is no such deprivation because "[t]he tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action." 405 U.S. at 66. As noted above, the same right to conduct separate proceedings has been recognized by Missouri courts and was expressly offered to appellant by the associate circuit judge.

The Supreme Court in Lindsey cited two of its previous cases recognizing that it is constitutionally permissible to segregate an action for possession of property from other claims that might be asserted by defenses or counterclaims. In both Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915), and Bianchi v.

Morales, 262 U.S. 170 (1923), Justice Holmes, for the Court, upheld state statutes that confined summary possessory suits to the issue of the right to possession and ruled that it was "permissible under the Due Process Clause to 'exclude all claims of ultimate right from the possessory action.'" Lindsey, 405 U.S. at 68, quoting Bianchi, 262 U.S. at 171.

Appellant eschews a deprivation-of-property argument but relies instead on the theory that he has been deprived of a "liberty" interest because being evicted as a "squatter" supposedly casts him in a negative light and adversely affects his reputation (Br. 43-44). He cites nothing to suggest that "liberty" can be stretched so far. His own quote from Board of Regents v. Roth, 408 U.S. 564, 573 (1972), which requires stigma plus some other tangible property or liberty interest, betrays his argument as circular. He says that his reputation is a liberty interest and that the unlawful detainer action affects his reputation by stigmatizing him. The "plus" that he asserts is the speculative, intangible effect on his reputation, honor, and integrity, which is a mere reiteration of his so-called liberty interest. He cannot claim that a money judgment is the necessary corollary of his supposed constitutional deprivation because he can win the unlawful detainer action by showing his superior right to possession, and if damages are imposed, it's because he has wrongfully held over when he was not entitled to. "Stigma" alone is insufficient to invoke due process protection. Jamison v. Dep't of Soc. Servs., 218 S.W.3d 399, 406 (Mo. banc 2007), citing Paul v. Davis, 424 U.S. 693, 701 (1976).

Acceptance of appellant's notion of "liberty" would constitutionalize the law of defamation and afford a constitutional cause of action to anyone who is the

subject of public criticism. Indeed, virtually any defendant in a civil case could contend that the allegations of the petition exposed him or her to public embarrassment and ridicule. Respondent did not accuse appellant of dishonesty or immorality, as the Roth court indicated was necessary to implicate the reputational liberty interest. Nor was there any gratuitous widespread dissemination of appellant's default to the community or any realistic suggestion that he was subjected to "public opprobrium." Valmonte v. Bane, 18 F.3d 992, 999 (2d Cir. 1994). Suffice it to say that being named a defendant in a real estate possessory action is not a stigma and does not deprive anyone of "liberty" in the constitutional sense. Appellant's argument to the contrary is spurious.

Even assuming, arguendo, that freedom from unlawful detainer suits is a protectable liberty interest, due process merely requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Jamison, 218 S.W.3d at 405, quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Appellant does not challenge the adequacy of the Notice of Foreclosure he received, and thus he was unquestionably entitled to contest the regularity of the foreclosure proceedings by seeking an injunction. All the claims he is now making could have been asserted there. Moreover, his curious refusal to accept the court's offer to stay proceedings while his claims were adjudicated in a proper jurisdiction should estop him from contending that he was denied an opportunity to be heard. And his currently pending wrongful foreclosure action betrays his advocacy here as disingenuous.

Appellant's "substantive due process" argument, based on the Missouri open courts provision, is likewise flawed on several grounds. First, for the reasons

stated in Lindsey, Broken Heart, Meier v. Thorpe, and Lake in the Woods, the courts are not closed to his claims. Second, a substantive due process claim requires conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. United States v. Salerno, 481 U.S. 739, 746 (1987). Unlawful detainer statutes have been on the books in Missouri since at least 1855, and no one has yet registered a shocked conscience. Whatever rights appellant claims were denied him were, as observed above, available to him in other actions.

Finally, the open courts provision, Art. I, § 14 of the constitution, prohibits "any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury." Mo. Alliance for Retired Americans v. Dep't of Labor & Indus. Relations, 277 S.W.3d 670, 675 (Mo. banc 2009) (plurality opinion) (emphasis in original). The analysis is the same as that used for procedural due process claims. Id. Hence, appellant's open courts theory is unavailing because (a) he is not a plaintiff in a personal injury case, (b) he has not been denied access to any court, and (c) the procedural due process analysis discussed above forecloses his open courts argument.

Contrary to appellant's substantive due process argument, this Court has cautioned that the "doctrine of judicial self-restraint" dictates a "reluctan[ce] to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Doe v. Phillips, 194 S.W.3d at 842. The Court further observed:

> "To be considered a 'fundamental' right protected by substantive due process, a right or liberty must be one that is 'objectively, deeply rooted in

the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" Id., quoting State ex rel. Nixon v. Powell, 167 S.W.3d 702, 705 (Mo. banc 2005).

Being subjected to summary court proceedings to determine the right to possess property hardly implicates the type of right or liberty described by the Court in Doe. Quite the contrary, for such procedures in unlawful detainer have themselves been part of the legal fabric in virtually every state in the union for well over 100 years and, from all that appears, have never been held constitutionally infirm by any court, state or federal.

IV. THIS COURT DOES NOT HAVE JURISDICTION OF THE ISSUES RAISED IN APPELLANT'S POINT IV, WHICH, IN ANY EVENT, WERE PROPERLY DECIDED BY THE ASSOCIATE CIRCUIT COURT.

In his Point IV (Br. 48-55), appellant criticizes the associate circuit court's rejection of his "standing" and "real-party-in-interest" arguments, and urges that the lower court's actions were inconsistent with existing precedent. The short answer is that this is precisely the type of issue that should have been explored in a trial *de novo* before the circuit court but was not properly appealed there. It is a matter for the circuit court which appellant waived when he did not seek relief in the proper forum within ten days, as required by §§ 512.180 and 512.190.

The slightly longer answer is that appellant has confused "standing" in the unlawful detainer sense with the jurisdictional requirement of Article III of the United States Constitution. To the extent that prudential "standing" is subject to attack in unlawful detainer proceedings, it means that the defendant can attempt to

show that the plaintiff is not entitled to possession of the premises and therefore cannot evict the defendant. Hill v. Morrison, 436 S.W.2d 255, 257 (Mo. App. 1969). Appellant made such an effort below, but the documentary evidence shows that his claim was properly rejected on the merits. The deed of trust vested legal title to the property in the trustee, including the right to foreclose and sell the property (L.F. 37). Unlike appellant's cited case of Citizens Bank of Edina v. West Quincy Auto Auction, Inc., 742 S.W.2d 161 (Mo. banc 1987), there was nothing irregular about the foreclosure sale. The trustee's deed of foreclosure deeding the property to Fannie Mae was in proper form and exhibited no indicia of irregularity (L.F. 21). Fannie Mae was not involved in any of appellant's dealings with the loan servicer, CitiMortgage, and appellant himself pleaded that Fannie Mae purchased the property with no investigation of the foreclosure or inquiry whether the foreclosure was justified (L.F. 57, ¶ 21).[6/]

Hence, by appellant's own reckoning, as established by its own pleadings, Fannie Mae was a bona fide purchaser for value without notice. It therefore was entitled to possession or, in appellant's parlance, had "standing" to pursue unlawful detainer and was the "real party in interest" in a case in which the only issue was the right to possession.

[6/] Indeed, imposing such an onerous burden of due diligence on bidders at foreclosure sales would discourage prospective buyers and likely reduce the amounts recovered on foreclosed properties, thereby increasing the deficiencies of the foreclosed borrowers and thwarting the public policy embodied in Chapter 534.

The issue of standing was therefore properly ruled against appellant by the court below. The balance of his collateral attack on the foreclosure was extraneous to unlawful detainer proceedings and should have been — and is being — contested in separate litigation. No further discussion is necessary here because of the jurisdictional void, but we would point out — lest the Court be misled — that appellant's insistence that he was not in default under the mortgage (Br. 9) is simply wrong, and his entire "wrongful foreclosure" theory thus collapses.

CitiMortgage had offered appellant a temporary modification plan with reduced monthly payments that expressly cautioned that the modified arrangement would not become a permanent unless and until a permanent Loan Modification Agreement was fully executed (L.F. 92). Appellant never signed the Loan Modification Agreement sent to him (L.F. 104-05). Accordingly, the reduced payments made by him in previous months were deficient under the original financing terms, leaving him in default and subject to foreclosure.

Furthermore, appellant's arguments to the contrary constitute a challenge to the "mode" of respondent's obtaining possession, which is "in essence a challenge to [respondent's] title to the property and, therefore, is not cognizable in an unlawful detainer action." Walker v. Anderson, 182 S.W.3d 266, 269 (Mo. App. W.D. 2006), citing Mika, 36 S.W.3d at 774-75. See also Phelps, 299 S.W.3d at 709 (where there is no written agreement to modify the underlying obligation, the defendant may not raise an unwritten "agreement" as a defense in unlawful detainer).

So (1) this issue is not properly before this Court; (2) standing in the unlawful detainer sense was properly resolved by the court below; and (3) in any event, appellant's collateral attack on the foreclosure is without merit.

CONCLUSION

For the reasons stated, this Court is without jurisdiction and the appeal should be dismissed; if the Court reaches the merits, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH

MISSOURI SUPREME COURT RULE 84.06(b) and (c)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word 2007, by which it was prepared, contains 5,927 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2011, I submitted electronic versions of this Brief of Respondent and the accompanying Appendix to the Clerk of the Supreme Court of Missouri for filing by using the Court's electronic filing system. I understand that doing so will accomplish service on all attorneys of record.

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